A

## TIONG CHENG PENG & ANOR

**v.**

## KER MIN CHOO & ORS

B

HIGH COURT MALAYA, JOHOR BAHRU
GUNALAN MUNIANDY JC
[ORIGINATING PETITION NO: 26-4-2008]
18 DECEMBER 2013

C ***COMPANY LAW:*** *Winding up - Liquidators - Application for removal of court appointed liquidator - Grounds for - Failure of liquidator to carry out fiduciary duties - Whether allegations of impropriety against liquidator made out - Whether liquidator acted in breach of fiduciary duties - Companies Act 1965, s. 232(1)*

D

This was an application by the first and second respondents ('Ker Boon Kee and Ker Min Choo') in the winding-up petition to remove the court appointed liquidator ('Teo') of the seventh respondent company ('Jotang Co'). Ker Boon Kee and Ker Min Choo ('the applicants') were the directors and shareholders of Jotang Co. The petition came up for hearing with a civil suit commenced by Jotang Co against the first ('Tiong') and second petitioners ('Liew') claiming for the return of advances and loans given by Jotang Co to them. On the day of hearing of the petition both parties agreed to a consent order that Jotang Co be wound-up and the suit against Tiong and Liew would be withdrawn. It was further ordered by consent that Jotang Co's claim against Tiong and Liew should be dealt with by the court appointed liquidator. The petitioners proposed that one Chua Kon Sing ('KS Chua') be appointed as the liquidator. On the objections raised by the respondents the court rejected KS Chua as a liquidator and appointed Teo as liquidator for Jotang Co. The court made the appointment with liberty given to the parties to apply for his removal should he fail to perform his duties professionally. The applicants alleged that Teo's conduct in managing the affairs of Jotang Co amounted to victimisation and oppression towards them without sufficient attention to the best interests of Jotang Co. A statement of affairs of Jotang Co as directed by Teo was submitted by the applicants. Teo then called for a meeting but the meeting was attended by only Tiong, Liew and Ker Boon Kee who then became the only members of the committee of inspection ('C/I'). According to the applicants, the selective notification for the meeting was to ensure that the majority vote in the C/I would

E

F

G

H

I

be held by Tiong and Liew. The applicants also alleged that Teo did not take effective action against Tiong and Liew to recover from them advance payments or loan sums amounting to RM374,500 each due and owing to Jotang Co which were undisputed and substantial debts that should have been recovered from Tiong and Liew. Further, there was also an allegation of conflict of interest of the part of Teo based on his unilateral decision to allow KS Chua and one SS Lew, to attend Jotang Co's C/I meeting. The objection to the attendance of KS Chua and SS Lew at the meeting was that they were agents of Tiong and Liew, who had appointed them to examine the accounts of Jotang Co. The most serious and grave allegation against Teo was that he had wrongfully and unlawfully altered the figures in the liquidator's account of receipts and payment and statement of the position in the winding-up, *ie*, the Form 75 filed by him with the Companies Commission of Malaysia. Teo sought to replace this Form which contained a declaration on oath by the deponent affirmed before a Commissioner of Oaths which attested to the truth of the statement with a new Form 75, some one and half years later. The time periods and figures had been changed in the second Form 75 which rendered it impossible for both statements to be true and correct. The inordinate delay in making the alterations some one and half years later and its timing after this application was filed raised grave doubts as to the *bona fide* of Teo's act. The issues that arose for determination *inter alia* were (i) whether Teo had failed to discharge his fiduciary duties; (ii) and whether the application to remove Teo as the liquidator should be allowed

**Held (allowing application with costs):**

**(1)** The court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way. The court will not interfere with the decision simply because its opinion might differ from that of the liquidator. The removal of the liquidator appointed by the court was at the discretion of the court but the discretion was not unfettered. It was exercised only if sufficient cause was shown for the removal. (paras 8 & 9)

**(2)** Instead of taking prompt and appropriate action, Teo delayed action by referring to possible claims for set-off by Tiong and Liew due to proofs of debt ('PODs') filed by them for RM458,074.40 and RM490,343.40 respectively which would exceed the debts owed. However the PODs disclosed that they were based on miscellaneous claims for losses and expenditure incurred for the law suit against the company. A shareholders' dispute was distinct from the company whose funds could not be utilised to pursue the personal action of the shareholders. The entire basis of the POD filed by Tiong and Liew was wrong in law and unsustainable. Hence, Teo had erroneously failed to pursue the Jotang Co.'s undisputed claims against Tiong and Liew on the basis of the flawed PODs. (paras 14 & 15)

**(3)** It was manifestly clear that KS Chua and SS Lew were not authorised to participate in the liquidation process. By associating with and seeking the assistance of interested parties who were not independent, Teo had consciously or unconsciously placed himself in a position of conflict of interest that jeopardised his impartiality and fairness in protecting the interests of all the shareholders. Teo had opened himself to undue influence by KS Chua and SS Lew to place the interests of Tiong and Liew over and above those of the company and the other shareholders. Teo's assertions that KS Chua and SS Lew were mere observers without decision making power was neither credible nor believable and it did not displace the allegation of bias towards the applicants. (para 17)

**(4)** Teo's conduct in altering the statutory Form 75 to suit his own ends could be considered serious and grave misconduct that caused loss of trust and confidence in his integrity. It was no less than tampering with an official statement given on oath to the Registrar of Companies. Teo had sworn to the truth and correctness to the statement which he decided to inexplicably alter some 1 1/2 years later. It was also tantamount to interference with ongoing court proceedings and was, possibly, contemptuous. (para 25)

**(5)** The applicants had made out a *prima facie* case of misconduct against Teo in the discharge of his fiduciary duties. Teo had failed to act impartially, objectively and independently but had instead acted in a biased manner, particularly against the applicants. Therefore, there was sufficient cause shown against Teo for his removal under s. 232(1) of the Companies Act 1965 for failure to discharge the fiduciary duties entrusted to him reasonably and *bona fide* in the interests of the company and all its contributories. (paras 22-23 & 27)

**Case(s) referred to:**
*Dato' Tan Toh Hua & Ors v. Tan Toh Hong & Ors [2001] 1 CLJ 733 CA* ***(foll)***
*Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd [2002] 4 CLJ 401 FC* ***(refd)***
*Wong Sin Fan & Ors v. Ng Peak Yam & Anor [2013] 3 CLJ 17 FC* ***(refd)***

**Legislation referred to:**
Companies Act 1965, ss. 167(6), 181, 232(1)

*For the petitioners - CM Yeo; M/s CM Yeo & Assocs*
*For the 1st & 2nd respondents - Justin Voon (HV Yoong with him); M/s Moi, NK Koh & Chee*
*For the liquidator - Gurbachan Singh; M/s Bachan & Kartar*

*Reported by Sandra Gabriel*

## JUDGMENT

**Gunalan Muniandy JC:**

**[1]** This is an application by the second and first respondents in the winding-up petition ('the applicants') to remove the court appointed liquidator of the seventh respondent company ('Jotang Co') that was ordered to be wound-up.

**[2]** The grounds of the application against the liquidator, one Teo Cheng Hua ('Teo'), are *inter alia*, that he had:

(i) failed to act impartially and/or had acted in a biased manner;

(ii) placed himself in a position of conflict;

(iii) failed to act *bona fide* and/or with fair play;

(iv) failed to investigate the affairs of Jotang Co as he rightfully should and/or for the interests of all the contributories (including the applicants); and

(v) failed to perform his work as a liquidator reasonably and to complete the liquidation expediently and professionally.

**Background Facts**

**[3]** The applicants were at all material times directors and shareholders of the Jotang Co and thus, its contributories until it was wound-up. The petitioners ('Tiong and Liew') filed the petition under s. 181 of the Companies Act 1965 ('CA') praying for their shares to be purchased by the first to sixth respondents and as an alternative, for the Jotang Co to be wound-up.

**[4]** The petition came up for hearing with a civil suit commenced by the Jotang Co *vide* Civil Suit No. 22-492-2009 against Tiong and Liew claiming for the return of advances and loans given by the company to them. However, on the day of hearing of the petition both parties agreed to a 'consent order' being recorded whereby it was agreed that Jotang Co be wound-up and the civil suit against Tiong and Liew be withdrawn. But, it was further ordered by consent that Jotang Co's claim against Tiong and Liew pursuant to the said suit should be dealt with by the court appointed liquidator.

**[5]** The petitioners proposed that one Chua Kon Sing ('KS Chua') from M/s KS Chua & Co be appointed as the liquidator but the proposal was opposed by the respondents as KS Chua had, *inter alia*, acted previously for Liew personally to check the accounts and records of Jotang Company. Both Tiong and Liew had applied for an order under s. 167(6) of the CA to appoint M/s KS Chua to examine the accounts of Jotang Co for them and an order was granted to appoint KS Chua as Liew's accountant. Tiong withdrew his application as he was not a director of Jotang Co.

**[6]** On the objections raised by the respondents the court rejected KS Chua as a liquidator and on the proposal of Tiong and Liew appointed Teo as liquidator for Jotang Co on 19 March 2011. The court made the appointment with liberty given to the parties to apply for his removal should he fail to perform his duties professionally.

## The Applicable Law

**[7]** The power to remove a court appointed liquidator is retained by the court. Section 232(1) of the CA states:

> 232: General provisions as to liquidators
>
> (1) A liquidator appointed by the Court may resign or on cause shown be removed by the Court.

**[8]** In the Federal Court case of *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* [2013] 3 CLJ 17, Zulkefli Makinudin CJ (Malaya) held:

> ... The principles of law governing an application to remove a provisional liquidator (or liquidator) are well set out as in the case of *Ng Yok Gee & Anor v. CTI Leather Sdn Bhd; Metro Brilliant Sdn Bhd & Ors (Interveners)* [2006] 3 CLJ 360 and include the following:
>
> (a) The court does not have an unfettered discretion, as cause must be shown before a liquidator can be removed. The position is not the same as it is when a liquidator is first appointed and the court may choose between two or more competing candidates.
>
> (b) The normal grounds for removal are that the liquidator has a personal unfitness, has failed to act impartially or is in a position where his duty and interest are in conflict.
>
> (c) The removal of the liquidator must be in the interest of all those who are interested in the company being liquidated. Thus, all the contributories and creditors of the company being liquidated must support such application to remove the liquidator.
>
> [24] Based on the above principles of law, we are of the view that the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way. The court will not interfere with the decision simply because its opinion might differ from that of the liquidator. (see the case of *Andrew Christopher Chuah Choong Eng Chuan v. Ooi Woon Chee & Anor* [2007] 2 CLJ 405).

**[9]** The removal of the liquidator appointed by the court is thus, at the discretion of the court but the discretion is not unfettered. It is to be exercised only if sufficient cause is shown for his removal. The onus lies on the applicant to show the existence of sufficient cause justifying the liquidator's removal.

## Analysis Of Grounds For Removal Of Liquidator

**[10]** The applicants (Ker Boon Kee and Ker Min Choo) alleged that since taking over management the Jotang Co on 10 May 2011 after being appointed on 29 March 2011, Teo acted in a partial and biased manner towards them. His conduct in managing the affairs of the company was alleged to be indicative of victimisation and oppression towards them without sufficient attention to the best interests of the company.

**[11]** A statement of affairs of the Jotang Co as directed by Teo was submitted by the applicants through Ker Boon Kee to Teo on or around 27 June 2011. Teo then called for a meeting on 29 July 2011 for which he purportedly issued notices to all the contributories. However, the meeting was attended by only Tiong, Liew and Ker Boon Kee who, then became the only members of the committee of inspection ('CI'). The applicants *vide* their first affidavit challenged Teo to show proof that notices to all contributories had been duly sent by him by showing proof of delivery/posting but to-date none has been shown by Teo. The implication of the selective notification for the meeting was, according to the applicants, to ensure that the majority vote in the CI would be held by Tiong and Liew. As such, the applicants sought an adverse inference to be drawn against Teo for failing to show proof that all the contributories had been duly notified of the meeting.

**[12]** Teo then commenced legal action in the name of the Jotang Co against the applicants personally *vide* Johor Bahru High Court ('JBHC') Suit No. 22NCVC-113-03/2012 claiming a sum of RM1,132,686.49 allegedly due from the applicants to the company. The applicants defended the suit and duly filed their statement of defence. The suit was, however, dismissed by the High Court with costs on 25 March 2013 for, *inter alia*, breach of the court's 'unless order' and an undertaking given by Teo's solicitors. The learned judge ordered Teo to pay costs of RM60,000 personally to the applicants, including costs to defend the action.

**[13]** Contrary to the haste with which Teo instituted the civil action ('the 113 suit') against the applicants, he conspicuously did not take effective action against Tiong and Liew to recover from them advance payments or loan sums amounting to RM374,500 each due and owing to the Jotang Co. These are clearly undisputed

and substantial debts that Teo should have recovered from Tiong and Liew. Apart from issuing letters of demand dated 13 May 2011 to them, Teo did not take any action to investigate the issue or to pursue the claim by legal action until now. In Civil Suit No. 22-492-2009 which was withdrawn the court expressly ordered the Jotang Co's claim against Tiong and Liew to be 'dealt with' by the said liquidator. The failure of Teo to take appropriate action to recover the said debts as ordered was in breach of the order. These debts, documented in the company's statement of affairs, have not been denied or disputed.

**[14]** Instead of taking prompt and appropriate action as above, Teo instead delayed action by referring to possible claims for set-off by Tiong and Liew due to proofs of debt ('PODs') filed by them for 'RM458,074.40' and 'RM490,343.40' respectively which would exceed the debts owed by them. However, the PODs disclosed they were based on miscellaneous claims for losses and expenditure incurred for the law suit against the company. It is trite law that a shareholders' dispute is distinct from the company whose funds cannot be utilised to pursue the personal action of the shareholders. In *Dato' Tan Toh Hua & Ors v. Tan Toh Hong & Ors* [2001] 1 CLJ 733; [2001] 1 MLJ 369, the Court of Appeal held:

> The High Court judge had exercised his discretion correctly when he granted the injunction prayed for. It has been held that it is a general principle of company law that the company's money should not be expended on disputes between shareholders. The court should prevent expenditure by directors of the company to resist to members' winding up petition based on the just and equitable ground. Such expenditure is a misfeasance (see pp. 373E, I-374A); *Re A Company (No 004502 of 1988); ex P Johonson* [1992] BCLC 701 followed.

**[15]** In view of the above principle, the entire basis of the POD filed by Tiong and Liew was wrong in law and unsustainable. Hence, the liquidator had erroneously failed to pursue the Jotang Co's undisputed claims against Tiong and Liew on the basis of the flawed PODs. The next issue for consideration is the alleged conflict of interest on the part of Teo arising out of enlisting the assistance of unauthorised parties associated to Tiong and Liew in the discharge of his duties. This allegation arises out of Teo's unilateral decision to allow KS Chua and his assistant, one SS Lew, to attend the Jotang Co's CI meeting. KS Chua was introduced as Teo's 'partner' while SS Lew was introduced as KS

Chua's assistant. Teo allowed their presence despite the objection raised by the first respondent (Ker Boon Kee). Their attendance at the company's CI meeting then became a permanent feature.

**[16]** The objection to the attendance of KS Chua and SS Lew at the CI meeting was that they were agents of Tiong and Liew, who had appointed them to examine the accounts of Jotang Co. Moreover, the proposal by Tiong and Liew for KS Chua to be appointed as liquidator in the winding-up petition had been rejected by the court on the respondents' objections pertaining to conflict of interest. Additionally, Liew had filed a POD dated 12 August 2011 against Jotang Co for a substantial sum exceeding RM490,000 which included sums paid by him to the firms of KS Chua and SS Lew. Teo himself had admitted having cooperated with KS Chua in the present liquidation process.

**[17]** It was manifestly clear that both KS Chua and SS Lew were persons not authorised to participate in the liquidation process as they were parties linked and aligned to Tiong and Liew, whose interests they were likely to advance to the detriment of the company's interest. Having allowed them to participate in the liquidation process, Teo had blatantly given rise to a conflict of interest situation. By associating with and seeking the assistance of interested parties who were not independent Teo had consciously or unconsciously placed himself in a position of conflict of interest that jeopardised his impartiality and fairness in protecting the interests of all the shareholders. He had, instead, opened himself to undue influence by KS Chua and SS Lew to place the interests of Tiong and Liew over and above those of the company and the other shareholders. Teo's latter assertion that KS Chua and SS Lew were mere observers without decision making power was neither credible or believable in the face of his earlier statements that they were his partners/assistants and the fact that there was no necessity whatsoever for observers. It did not displace the allegation of bias towards the applicants.

**[18]** The most serious and grave allegation against Teo was that after the filing of this application and service on him, he had wrongfully and unlawfully altered the figures in the liquidator's account of receipts and payment and statement of the position in the winding-up, ie, the Form 75, CA for the period 29 March 2011 to 29 September 2011 filed by him with the Companies Commission of Malaysia on or about 21 November 2011.

He sought to replace this Form F with a new Form F belatedly filed on or about 28 May 2013 which was some 1 1/2 years later. His act in altering the statutory form was alleged to be a clear interference with the administration of justice as it constituted tampering with documents and accounts midway through proceedings to suit himself and tantamount to contempt of court. The respondents cited in support *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401; [2002] 4 MLJ 241, 248 where it was held:

> Following the principle, *Oswald's Contempt of Court* (3rd edn) provides a good guide to a general definition of contempt of court, thus:
>
> > To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigants or their witnesses during litigation.
>
> What therefore is contempt of court, 'is interference with the due administration of justice' - per Nicholls LJ at p. 923 of *Attorney-General v. Hislop & Anor* [1991] 1 All ER 911 (CA).
>
> In view of the generality of the phrase 'interference with the due administration of justice', we are of the view that the categories of contempt are never closed.

**[19]** The original Form 75 showed that the payments made by the applicants after the winding-up order of the Jotang Co had been recognised by Teo as being valid and proper. His decision to change the figures and accounts appeared to be in response to the applicants' first affidavit. The contents of the original Form 75 disclosed that the '113 suit' against the applicants may have had no basis at all.

**[20]** It is important to note that the Form 75 contains a declaration on oath by the deponent affirmed before a Commissioner of Oaths attesting categorically to the truth of the statement. The time periods and figures had been changed in the second Form 75 significantly, rendering it impossible for both statements to be true and correct. In effect, Teo had inexplicably changed his position and no longer acknowledged payments and receipts for the period '29 March 2011 to 9 May 2011' which amounted to the most substantial sums. The inordinate delay in

making the alterations some 1 1/2 years later and its timing after this application was filed raised grave doubts as to the *bona fide* of Teo's act which was alleged to be an afterthought.

**[21]** The gravity and seriousness of making a false statement on oath cannot be overstated. The entire credibility of Teo was called into question. He had failed in his duty to disclose all material facts in a frank, candid and honest manner. His sworn statement which was subsequently altered, showed a propensity for not disclosing the whole truth even on oath and instead, making false statements to circumvent proceedings commenced by the applicants.

**Conclusion**

**[22]** To sum up, upon consideration of all the facts and evidence and the chronology of events as alluded to, I found that the applicants had made out a *prima facie* case of misconduct against the liquidator ('Teo') in the discharge of his fiduciary duties to the seventh respondent company and all its contributories.

**[23]** Teo had failed to act impartially, objectively and independently but had instead acted in a biased manner, particularly against the applicants. He had blatantly placed himself in a position of conflict of interest by associating with and seeking the assistance of interested and unauthorised parties who were not independent in disregard of the overall rights and interests of all the contributories.

**[24]** Teo had in several instances shown not to have acted *bona fide* and with fairness towards all contributories but had allowed himself to be dictated by the petitioners whose interests he allowed to override the general interests of the company. He had also failed to investigate the affairs of the wound-up company expediently and efficiently and to take appropriate action to recover undisputed debts of the company, particularly from the petitioners, which were clearly substantial. There was no sufficient justification for his neglect or failure to act promptly in this regard.

**[25]** Teo's conduct in altering the statutory Form 75 to suit his own ends could be considered serious and grave misconduct that caused loss of trust and confidence in his integrity. It was no less than tampering with an official statement given on oath to the Registrar of Companies. Teo had sworn to the truth and

correctness to the statement which he decided to inexplicably alter some 1 1/2 years later. It was also tantamount to interference with ongoing court proceedings and was, possibly, contemptuous.

**[26]** The petitioners and Teo had not rebutted the allegations of misconduct on the part of Teo that were borne out by the evidence. They instead sought to rely on the alleged previous misdeeds of the first and second respondents that were basically the subject of the civil suit commenced by Teo against them that was eventually struck out.

**[27]** In the final analysis, I held that sufficient cause had been shown against the liquidator for his removal under s. 232(1) of the CA for failure to discharge the fiduciary duties entrusted to him reasonably and *bona fide* in the interests of the company and all its contributories. I, therefore, allowed this application with costs of RM25,000 to be paid by the liquidator personally and RM10,000 to be paid by the petitioners to the applicants.